UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 674

Case No. 752: GONDA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Cyriaque Gonda, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 31 August 1993;

Whereas, on 30 August 1993, the Applicant filed an application containing pleas which read, in part, as follows:

"II. Pleas

...

... to submit my contract to the body legally invested with the power to convert it or extend it within the time-limits established by the rules.

... to compensate me for the services I rendered, at the expense of great sacrifices, after the end of the established two-year period.

... to apply the appropriate provisions in case of separation (if that should occur), in particular the appeals procedure and the application of staff rule 109.3(b).

D. ... [to pay] compensation of at least nine hundred and fourteen thousand seven hundred and forty-three American dollars and sixty-three cents, in accordance with article 9, paragraph 1, of the Statute.

...

[To rescind] ... the decision of the Secretary-General and [to continue] ... my appointment."

Whereas the Respondent filed his answer on 22 November 1993;

Whereas the Applicant filed written observations on 29 January 1994;

Whereas the Applicant filed corrections to his written observations on 1 February 1994;

Whereas the Applicant submitted additional documents on 12 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 31 December 1989, on a two-year probationary appointment as an Associate Recruitment and Placement Officer, General Service Staffing Section, Recruitment and Placement Division (RPD), Office of Human Resources Management (OHRM), at the P-2 level. He was separated from service on the grounds of misconduct, with effect from 18 February 1993.

On 22 October 1991, the Applicant had completed his section of a performance evaluation report (PER), covering the period 31 December 1989 to 31 October 1991. On 23 December 1991, the Chief, General Service Staffing Section, RPD, OHRM, signed the PER as first reporting officer, and on 10 January 1992, the Director, RPD, signed the PER, giving the Applicant an overall rating of "a good performance." On 23 April 1992, the Assistant Secretary-General, OHRM, signed the PER.

Prior thereto, following allegations that the Applicant had engaged in sexual harassment, the Director, Staff Administration and Monitoring Service, had established an informal Board of Inquiry to

investigate these allegations. The Board of Inquiry held ten meetings in late 1991 and early 1992, during which a number of interviews were conducted. On 6 January 1992, the Board of Inquiry submitted its report to the Director, Staff Administration and Monitoring Service. The conclusions of the report read, in part, as follows:

> "...
>
> 37. ... [the Applicant] has conducted himself in a manner that is inappropriate. At the same time, the Board considers that the extent of [the Applicant's] misconduct should be judged against the backdrop of the Organization's responsibility in guiding and supervising newly recruited, young and inexperienced staff members."

On 14 February 1992, the Assistant Secretary-General transmitted the report of the Board of Inquiry to the Applicant, noting that the Board had not established any misconduct on the Applicant's part but requesting him to bear in mind the Board's observations in his future dealings with candidates and colleagues.

On 27 February 1992, an applicant for employment with the United Nations wrote a letter of complaint to the Chief, General Service Staffing Section. She stated that she had come to the United Nations seeking a secretarial position, and the Applicant had suggested that she take English and typing courses. She had requested money for these courses from her parents, who had sent her a cheque, which the Applicant offered to cash for her. She stated that he had cashed two cheques for her, but had not given her money for the third cheque, in the amount of $380, which he had taken. She said that a friend had tried to convince him to give her the money and that he had replied "that he had done a lot for [her]." She concluded with the request, "I hope you'll be able to make him give me my parents money to pay for my school."

On 3 March 1992, the Director, RPD, forwarded this letter to the Assistant Secretary-General, OHRM, and informed him that he had questioned the Applicant on the allegations contained therein. The

Applicant had explained that the job applicant who wrote the letter was a classmate and close friend of his brother's, that she had often visited his home, and that his family had been helpful to her on many occasions. He said that it was his brother who had cashed the cheques for her, that he "had been aware of some confusion regarding the third cheque," and that he had given his brother the money to send her, and told her that the money was being mailed. The Director, RPD, reported that he had then called the job applicant to ask whether she had received the money. She told him that "she was not a friend of [the Applicant's] brother, that they had never been students together, and that she had only met his family on 31/12/91 when [the Applicant] had invited her to his home ..." With respect to the third cheque, she confirmed that they had discussed it recently but that the Applicant told her that he had lost the cheque. In conclusion, the Director, RPD, stated:

> "In view of the wide discrepancies between the two versions of the situation and the possibility of inappropriate conduct on the part of [the Applicant] in his relations with an applicant, I propose that SATD [Staff Administration and Training Division] be requested to investigate this incident."

Subsequently, in a note for the file, dated 20 March 1992, a Personnel Officer indicated that the job applicant had confirmed that she had received from the Applicant the proceeds of the third cheque. The Personnel Officer recorded his telephone conversation with her, noting:

> "[She] stressed that she met [the Applicant] only when she applied for employment with the United Nations. He tried to date her and had called her at home on some occasions. Considering his assurances and offers of help, she did not know how to best deal with him because she did not want to lose her opportunity to work for the UN ..."

In a letter dated 20 March 1992, to the Assistant Secretary-General, OHRM, the Director, RPD, made reference to the calls he had received from the job applicant regarding the cashing of her cheque, and stated further that:

> "... even though no disciplinary action has been taken, [the Applicant] has now behaved on two occasions in a manner incompatible with the conduct expected of a Recruitment and Placement Officer, acting towards applicants for employment in ways that reflect on the integrity of the Recruitment and Placement Division.
>
> In the circumstances, I am not in a position to recommend that he be offered a permanent appointment in his present functions."

On 29 June 1992, in a note for the file, the Officer-in-Charge, Allowances and Benefits Unit, recorded that she had been contacted several times since September 1991 by the Bursar of the school in which the Applicant's three children were registered for the academic year 1991/1992. After the first call, she certified to the Bursar the payment of an education grant advance to the Applicant. She noted that the Bursar subsequently called, two or three times, concerning late payment of the school fees by the Applicant. In February, he called again to inform the Officer-in-Charge, Allowances and Benefits Unit, that the children had been expelled from the school because of the recurrent late payments and the fact that most of the Applicant's cheques had been dishonoured by the bank on which they had been drawn. In a letter dated 13 May 1992, the Bursar indicated the particulars of the payments made by the Applicant, totalling $11,771.07, which was less than the $13,110.00 he had received as an advance on 8 October 1991, and less than the $20,950.60 due for tuition.

On 30 June 1992, the Director, SATD, OHRM, wrote to the Applicant regarding the review of his probationary appointment. She added that before the review, she wished "to request your comments on certain allegations which have been made against you, and on

which you have not had the opportunity to present your views for the record." The allegations transmitted to the Applicant for comment were (i) his failure, for almost a year, to remit to a job applicant the funds he obtained in cashing a cheque for her; and (ii) his failure to remit to the school in which his children were registered, the full amount he had received from the United Nations as an advance on his education grant. She requested the Applicant's comments by 17 July 1992.

In his first comments on the allegations, dated 7 July 1992, the Applicant claimed that the job applicant was "not as you say in your memorandum, a candidate for employment that I happened to know through my work as RPO [Recruitment and Placement Officer]," but rather a "very good and longtime friend of my family ..." With regard to the education grant advance, the Applicant explained that he had withdrawn his children from the school "due to the intolerable and inhuman and uncivilized treatment that my children were subjected to ..." In conclusion, he stated that he was "tired of this systematic victimization."

In subsequent comments, dated 10 July 1992, the Applicant noted that his probationary appointment, effective 31 December 1989, should have been reviewed before December 1991. He claimed that under staff rule 104.12(a), as his probation had not formally been extended, he had the right to expect an automatic conversion to a permanent appointment.

On 4 August 1992, the Director, SATD, OHRM, informed the Applicant that the Secretary-General had decided to refer his case to the Joint Disciplinary Committee (JDC) as he had "failed to meet the standards of integrity expected of international civil servants". Thus, he had failed to remit the proceeds of a cheque he had cashed for a job applicant, failed to use the full amount of the education grant advance he had received from the United Nations to pay the educational institution, in accordance with its payment schedule and he had not informed the United Nations of his lesser payments.

On 26 January 1993, the JDC adopted its report. Its considerations and conclusion read, in part, as follows:

"...

20. The Panel observes that it is for the staff member to demonstrate his integrity during the period of probation. The Administration is not required to prove beyond a reasonable doubt that the staff member is guilty of misconduct even once - much less thrice. The Administration is required to come to a reasonable judgement as to a staff member's fitness for permanent appointment on the basis of its observation of his conduct and performance, and it must be prepared to justify that judgement in the event of an appeal. The Panel sees no reason for the Administration to have invoked the costly and cumbersome disciplinary process, instead of making a rational judgement as to [the Applicant]'s fitness for permanent appointment on the basis of the facts already available to it.

21. The Panel felt, nevertheless, that it had to deal with the two charges referred to it. In the first, concerning [the job applicant] and the checks, the Panel found [the Applicant's] several statements difficult to reconcile and, consequently, difficult to believe. For example, he told the Panel that there had been no third check, and that he had paid her for it twice - once before she complained, and once after. Again, that, on the advice of counsel - who did not appear - he had signed a statement that there were three checks, but, actually, there were only two, but he had paid her four times. On this charge, the Panel finds that the Administration has not proven misconduct. By his testimony, however, [the Applicant] has created strong doubts as to his veracity.

22. In his testimony on the second charge, [the Applicant] again gave cause to question his credibility. For example, despite his several assertions concerning his commitment to his children's welfare, he could not remember the name of the school they attended from March to June of 1992. The Panel noted that [the Applicant] was not a stranger to the education grant procedures; he had been through them twice before. He should have informed and reimbursed the Organization promptly, even though the Administration had been less than diligent in following up.

23. [The Applicant] acknowledged that at least one of his checks was returned for insufficient funds and that at least one other of his payments to the Lyceum Kennedy was late. There was no explanation offered why he had retained the remainder of the advance until (at least) the date of his

testimony. It was clear to the Panel that he had, as charged, used UN monies for purposes other than that for which it had been advanced to him, and that, therefore, he was guilty of misconduct.

24. The Panel also concluded that [the Applicant] still owed money to the Lyceum Kennedy, and that his relations with that school had tended to bring the UN into disrepute.

...

Conclusion

26. The Panel finds that [the Applicant] does not meet the standards of integrity required of an international civil servant and is, therefore, not worthy of permanent appointment."

On 12 February 1993, the Director of Personnel transmitted the JDC report to the Applicant and informed him, inter alia:

"The Secretary-General ... has taken note of the Committee's finding that you had, as charged, used UN monies for purposes other than that for which those monies had been advanced to you and that, therefore, you were guilty of misconduct. He has also taken into consideration the entirety of the record in your case, including a prior finding by the Board of Enquiry of inappropriate conduct. The Secretary-General has concluded that your conduct has seriously deviated from the UN standards of conduct and integrity expected of each staff member of the Organization and this misconduct is incompatible with continued service with the Organization.

Pursuant to his discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to separate you from service for misconduct under staff regulation 10.2 paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that you be paid compensation in lieu of notice in accordance with staff rule 109.3(b) and an indemnity pursuant to Annex III(c) to the Staff Regulations in the amount of one half of the termination indemnity provided under paragraph (a) of the same Annex."

On the same date, the Applicant wrote to the Secretary-General, noting that after his two years of probationary service, on 23 December 1991, he had been given a satisfactory performance evaluation and that the Chief, General Service Staffing Section, and the Assistant Secretary-General, OHRM, "assured me at that time that it was only a matter of formality to finalize the conversion of my contract to permanent ..." He requested urgent consideration of the matter.

In a reply dated 25 February 1992, the Officer-in-Charge, OHRM, recalled that during the Applicant's employment, serious allegations had been made against him which had been investigated by the JDC. In light of the JDC's recommendation, the Secretary-General had decided to impose the disciplinary measure of termination.

On 30 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General's decision to dismiss him for misconduct was made on the basis of an improper assessment of facts and procedural errors. Any decision relating to the eligibility of the Applicant for permanent appointment, following the two year probationary period, should have been made by the Appointment and Promotions Committee, in accordance with staff rule 104.13, and not by a JDC.

2. In accordance with staff rule 104.12(a), the Applicant has the right to automatic conversion of his probationary appointment to a permanent appointment, as his probation was not formally extended and he was given a satisfactory performance evaluation.

Whereas the Respondent's principal contention is:

The Secretary-General has broad discretion with regard to disciplinary matters, including determinations of what constitutes misconduct warranting dismissal. The Secretary-General's decision

to dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by a mistake of fact, lack of due process, prejudice, or other extraneous factors.

The Tribunal, having deliberated from 13 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant seeks the rescission of the decision of the Secretary-General to dismiss him for misconduct. In addition, he seeks damages of $914,743 in compensation for the moral, physical and professional harm he suffered.

The Applicant argues that: (1) the Secretary-General's decision to dismiss him for misconduct was reached by an improper assessment of facts; (2) the decision was vitiated by errors of procedure; and (3) the Applicant's probationary appointment had exceeded two years; as he had performed satisfactorily during this period, his separation from service constituted a violation of his rights. Indeed, the issue in this case is essentially whether the rights of the Applicant were violated by his dismissal for misconduct.

The Applicant has requested the production of documents and witnesses. The Tribunal has considered these requests and decides to reject them. The information already before the Tribunal is adequate for the resolution of the case.

II. The Applicant was recruited by the United Nations and given a probationary appointment on 31 December 1989. He served as an Assistant Recruitment and Placement Officer at the P-2 level. As a staff member of the United Nations, he had the responsibility to fulfil certain obligations under the Charter and the Staff Regulations (Judgement No. 377, Jabri (1986). Staff regulation 1.4 sets forth those basic obligations:

> "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action ... which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. ..."

III. The Respondent determined that the Applicant failed to meet his obligations and dismissed him for misconduct. The responsibility to appoint staff members and the corollary power to dismiss them is vested in the Secretary-General. Article 101 of the Charter states that the Secretary-General must give paramount consideration to employing staff of the "highest standards of efficiency, competence and integrity" (emphasis added). Correlatively, when staff do not meet these standards, the Secretary-General has the responsibility to discipline them. This Tribunal has held, in a number of previous decisions, that the choice of disciplinary measure to be imposed on those failing to meet those standards falls within the Secretary-General's discretionary power (Judgements No. 424, Ying (1988); No. 425, Bruzual (1988) and No. 429, Beyele (1988)). The choice of dismissal as a disciplinary measure is available and is set forth in staff rule 110.3.

IV. Throughout his application, the Applicant insists that his dismissal was illegal. One of his main contentions is, that it was for the appointment and promotion bodies to determine his qualification for permanent appointment and this decision was not to be based on advice from the Joint Disciplinary Committee (JDC).

V. It is clear to the Tribunal that the charge against the Applicant was one of misconduct; he was not being reviewed for appointment or promotion. If misconduct charges are to be considered, these charges must be reviewed in the context of JDC

proceedings and not in the context of a contract review where the due process safeguards of the disciplinary process are not present (Judgement No. 610, Ortega (1993)). In fact, staff rule 110.4(b) provides that except in the case of summary dismissal, no disciplinary measure may be imposed until the matter has been referred to the JDC. Only the JDC has jurisdiction to hear disciplinary cases.

VI. Turning to the charges of misconduct which led to the Applicant's dismissal, the Tribunal, at the outset, reiterates a point made by the JDC when it reviewed this case. During the probationary period, it is the responsibility of the staff member to demonstrate his or her integrity. The Respondent is not required to prove beyond a reasonable doubt that a staff member is guilty of misconduct. He is only required to come to a reasonable judgement on the staff member's fitness for permanent appointment, based on the observation of his or her conduct and on the evaluation of his or her performance.

VII. The Tribunal notes the Applicant's dissatisfaction with the tenor of the JDC report's ultimate conclusion that he was not worthy of permanent appointment. Although it would have been desirable for the JDC, in keeping with its mandate, to state its recommendations in terms of disciplinary action, in this case, the Tribunal considers this point a matter of semantics. The Tribunal finds, as the Respondent evidently did, that the JDC's statement was tantamount to a recommendation of dismissal. It is clear that the JDC found that the Applicant had engaged in misconduct and had failed to meet the standards required of an international civil servant.

VIII. The Applicant's history at the United Nations was problematic. In late 1991 and early 1992, a Board of Inquiry investigated allegations of sexual harassment made against the

Applicant by several women candidates for job openings within the domain of the Applicant's responsibility. Following its investigation, the Board concluded that the Applicant "had conducted himself in a manner that was inappropriate".

On 27 February 1992, an applicant for employment complained to the United Nations that the Applicant obtained a cheque from her for $380.00 on the representation that he would cash it for her. He then failed to remit the proceeds. She claimed that she had met the Applicant when she applied for employment with the UN. It was only a year later, following her complaint, that the Applicant remitted the proceeds to her.

In reviewing this incident, the Tribunal fully agrees with the JDC in its conclusion that the Applicant's explanation regarding the charge lacked veracity. He made contradictory statements which led the JDC and now leads the Tribunal to question his credibility.

IX. The third incident which occurred during the Applicant's employment with the UN relates to the education grant advanced by the Organization for the Applicant's children. The Applicant failed to use the full amount of the advance to pay the educational institution in accordance with its payment schedule. He failed to inform the Organization that the educational expenses actually paid by him were substantially lower than those on which the advance had been based. The Applicant claims that the Respondent overstepped his powers by involving himself in his private life. This was not the case. "The Standards of Conduct in the International Civil Service" provide:

> "53. In principle, the private life of the international staff member is his concern and should not be intruded upon by his organization. At the same time, in order that his private life will not bring his organization into disfavour, he must set himself a high standard of personal conduct ...
>
> 54. Scrupulous compliance with laws of the host country, ... honouring of financial obligations - these are only a few of the obvious requirements which derive from the general principle."

X. The Tribunal observes that the Applicant glosses over the issue of misconduct and attempts to minimize its seriousness. His main contention is that the Organization wronged him by not granting him a permanent position. His claim is that the Organization is using these charges in order not to grant him such a position, which he strongly believes is due to him. The Applicant contends that, in dealing with his case, the Respondent acted in an abusive and prejudicial manner. The Tribunal has carefully studied the Applicant's submission. It is of the view that the Applicant has not established his case; his contentions are at times erroneous and at times incoherent.

The Tribunal has consistently held that the burden of proving prejudice or other improper motivation rests with the one affirming it. (Cf. Judgements No. 465, Safavi (1989) and No. 336, Maqueda Sanchez (1984)). The Applicant has failed to meet this burden of proof.

XI. The Tribunal agrees with the Secretary-General's conclusion that the Applicant's conduct has seriously deviated from the UN standards of conduct and integrity expected of each staff member of the Organization and that this is incompatible with continued service with the Organization.

XII. The Tribunal concludes that the Applicant's rights were not violated by his dismissal. The Secretary-General acted within his discretionary power to separate the Applicant from service for misconduct. This was not vitiated by a mistake of fact, by lack of due process or by prejudice or any other extraneous factors. The Applicant was paid the appropriate compensation in lieu of notice, in accordance with staff rule 109.3(b), and an indemnity pursuant to Annex III(c) to the Staff Regulations.

XIII. In the light of the above, the Tribunal rejects the application in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary